



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-HQ-ES-2019-0115; FF09E23000 FXES1111090FEDR 223]

RIN 1018–BD84

Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (“the Service”) is rescinding the rule titled “Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat” that published on December 18, 2020, and became effective January 19, 2021. The rule set forth new regulations addressing how we exclude areas of critical habitat under section 4(b)(2) of the Endangered Species Act of 1973, as amended, outlining when and how the Service will undertake an exclusion analysis. This action removes the regulations established by that rule.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Public comments and materials received, as well as supporting documentation used in the preparation of this final regulation, are available on the internet at <https://www.regulations.gov> in Docket No. FWS-HQ-ES-2019-0115.

FOR FURTHER INFORMATION CONTACT: Bridget Fahey, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike, Falls Church, VA

22041–3803, telephone 703/358–2171. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

On January 20, 2021, the President issued Executive Order (E.O.) 13990, which, in section 2, required all executive departments and agencies to review, and to consider revising or rescinding rules inconsistent with the policy set forth therein, Federal regulations and actions taken between January 20, 2017, and January 20, 2021. In support of E.O. 13990, a “Fact Sheet” was issued that set forth a non-exhaustive list of specific agency actions that agencies are required to review to determine consistency with the policy considerations articulated in section 1 of the E.O. (See www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/). Among the agency actions listed on the Fact Sheet was our December 18, 2020, final rule (85 FR 82376; hereafter referred to as “the Final Rule”) that established new regulations addressing how we implement section 4(b)(2) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.; hereafter, “the Act”). On January 14, 2021 (5 days before the Final Rule took effect), seven environmental groups challenged it, filing suit against the Service in Federal district court in Hawaii. Shortly thereafter on January 19, 2021, 19 States similarly filed suit challenging the Final Rule in the Northern District of California. Parties in both cases have agreed to long-term stipulated stays in the litigation as this rulemaking proceeds.

In our review of the Final Rule pursuant to E.O. 13990, we evaluated the benefits and drawbacks of the Final Rule, the necessity of the rule, its consistency with applicable case law,

and other factors. Following our review, we determined that the Final Rule is problematic because it unduly constrains the Service’s discretion in administering the Act, potentially limiting or undermining the Service’s role as the expert agency and its ability to further the conservation of endangered and threatened species through designation of their critical habitats. Therefore, on October 27, 2021, we proposed to rescind the Final Rule (86 FR 59346). We solicited public comments on the proposed rule through November 26, 2021. In response to several requests, we extended the deadline for submission of public comments to December 13, 2021 (86 FR 67012, November 24, 2021).

In this final rule, we focus our discussion on the comments we received during the comment period and our consideration of the issues raised. For background on the statutory and legislative history and case law relevant to the Final Rule, we refer the reader to the proposed rule to the Final Rule (85 FR 55398, September 8, 2020). For our detailed rationale for proposing to rescind the Final Rule, we refer the reader to the proposed rule to this final rule (86 FR 59346, October 27, 2021).

After consideration of the information provided through the public comment process and for reasons outlined in the proposed rule and this document, we are finalizing the proposal to rescind the December 18, 2020, Final Rule. After the effective date of this rule, the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (16 U.S.C. 1533(b)(2)), which we published jointly with the National Marine Fisheries Service (NMFS; collectively the Services) on February 11, 2016 (81 FR 7226) (hereafter “the Policy”), and the joint regulations at 50 CFR 424.19, which were set forth by a final rule that published August 28, 2013 (78 FR 53058) (in this document we refer to these regulations either as 50 CFR 424.19 or as the “2013 Rule”), will revert to being the governing rules and standards for any critical habitat rulemakings that the Service publishes. We note, however, as discussed below, that one aspect of the rulemakings for the Policy and the 2013 Rule—the language in the preambles indicating that decisions not to exclude areas under section 4(b)(2) are committed to agency discretion and

are judicially unreviewable—will no longer be applicable. We have provided clarification to questions and concerns below in the responses to public comments.

Rationale for Rescission

In the preamble to the Final Rule, we explained that, in light of the Supreme Court’s decision in *Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361 (2018) (*Weyerhaeuser*), we needed to revisit certain language in the preambles for the 2013 Rule and the Policy that asserted that exclusion decisions are committed to agency discretion and are therefore judicially unreviewable. For example, in the preamble to the 2013 Rule, the Services had cited case law that supported their conclusion that exclusions are wholly discretionary and that the discretion not to exclude an area is judicially unreviewable (78 FR 53072, August 28, 2013). The Services also stated in the preamble to the Policy that then-recent court decisions resoundingly upheld the discretionary nature of the Secretaries’ consideration of whether to exclude areas from critical habitat (81 FR 7226, p. 7233; February 11, 2016), and that, although the Services will explain their rationale for not excluding a particular area, that decision is judicially unreviewable because it is committed to agency discretion (*id.* at 7234).

We explained in the Final Rule that the Supreme Court’s opinion in *Weyerhaeuser* had rendered inaccurate those prior assertions that decisions not to exclude areas from critical habitat designations are not judicially reviewable. Although the word “may” in the second sentence of section 4(b)(2) of the Act indicates discretionary authority and thus the Secretary is not required to exclude areas in any particular circumstances (16 U.S.C. 1533(b)(2)), it was clear from the Court’s decision in *Weyerhaeuser* that courts may review decisions not to exclude for abuse of discretion under section 706(2) of the Administrative Procedure Act (APA, 5 U.S.C. 706(2)). 139 S. Ct. at 371. The Final Rule summarized the effect of the Court’s opinion in *Weyerhaeuser* as having underscored how important it is for the Service to be deliberate and transparent about how we go about making exclusion decisions. The Final Rule further explained that the

Service's objective in promulgating the rule was to provide that "transparency, clarity, and certainty to the public and other stakeholders" (85 FR 82376, p. 82385; December 18, 2020).

During the comment period for the 2020 proposed rule, we received numerous public comments that provided both support and opposition for many of the provisions included in that proposed rule (85 FR 55398, September 8, 2020). At that time, we considered all of the comments and decided that finalization of the Final Rule was a permissible policy decision. In issuing the Final Rule, we concluded that the criticisms brought forth by commenters were not sufficient to change our approach in that rulemaking.

We acknowledge that we are now persuaded that many of the commenters' criticisms regarding the Final Rule are valid, and we are including some of those same criticisms as part of our support for rescinding the Final Rule. We have reconsidered the Final Rule and considered public comments and we have now changed our policy view of the best way to strike the appropriate balance between transparency and predictability on the one hand, and flexibility and discretion on the other. We now find that the Final Rule is problematic for three overarching reasons: it limits or undermines the Service's role as the expert agency; it constrains the Service's discretion, thus decreasing the agency's ability to further the conservation of endangered and threatened species through designation of their critical habitats; and it does not further the goal of providing clarity and transparency and instead creates confusion. We provide further explanation below as to why we have concluded that implementation of the Policy and the regulations at 50 CFR part 424.19 is preferable to the Final Rule.

In the proposed rule we provided rationale for rescinding each of the following provisions of the Final Rule: the statement that we will always undertake a discretionary exclusion analysis whenever a proponent of an exclusion provides credible information supporting the exclusion; the generic prescription for weighing impacts; the statement that we will always exclude areas from a critical habitat designation whenever the benefits of exclusion outweigh the benefits of inclusion; the treatment of Federal lands; and the enumeration of factors

to consider under section 4(b)(2) of the Act. Having reconsidered our reasoning for rescinding each of these provisions in light of the public comments we received on the proposed rule (86 FR 59346, October 27, 2021), we reaffirm our conclusions with respect to each of these provisions. For the specific reasons set forth below and our detailed rationale in our proposed rule, the Service now concludes that rescinding the Final Rule and resuming implementation of 50 CFR 424.19 and the Policy will better enable the Service to ensure conservation of endangered and threatened species and the ecosystems on which they depend, as mandated by the Act.

First, the Final Rule potentially limits or undermines the Service's role as the expert agency responsible for administering the Act because it potentially gives undue weight to outside parties in guiding the Secretary's statutory authority to exclude areas from critical habitat designations. Through the Secretary, Congress delegated the authority to designate critical habitat for listed species to the Service. Section 4(b)(2) of the Act sets out some of the responsibilities and steps that this authority entails, including evaluating information about the economic, national security, and other relevant impacts of designating particular areas as critical habitat; determining which among competing data on potential impacts is reliable; weighing the impacts of designation against the benefits of designating those areas and determining the weight that each should receive in the analysis; and making exclusion decisions based on the best scientific and commercial data available. The Final Rule potentially limits the Service from fulfilling aspects of this role by giving parties other than the Service, including proponents of particular exclusions, an outsized role in determining whether and how the Secretary will conduct exclusion analyses. This undue reliance on outside, and potentially directly affected parties in certain aspects of the process interferes with the Secretary's authority to evaluate and weigh the information provided by those parties in the course of determining what specific areas to designate as critical habitat for a species.

Second, the rigid ruleset established by the Final Rule, in all situations regardless of the specific facts, as to when and how the Secretary will exercise the discretion to exclude areas

from critical habitat designations constrains the Service's discretion, thus decreasing the agency's ability to further the conservation of endangered and threatened species through designation of their critical habitats. Although the preamble and response to comments in the Final Rule refer to using the best available information and factoring in the case-specific information to support exclusion analyses, the regulatory text mandates a rigid process for when the Secretary will enter into an exclusion analysis, how weights are assigned to impacts, and when an area is excluded. Therefore, implementing the Final Rule undermines the Service's ability to further the conservation of the species because the ruleset applies in all situations regardless of the specific facts at issue or the conservation outcomes. We now recognize that implementing the Final Rule would result in competing and potentially conflicting legal requirements when we undertake an exclusion analysis. In section 4(b)(2) of the Act, Congress vested in the Secretary the authority and responsibility to assign weights to the impacts of designating particular areas as critical habitat. Automatically assigning weights based on information from parties other than the Secretary or their chain of command, including from parties that may have direct economic or other interests in the outcome of the exclusion analysis, regardless of whether those parties have expert or firsthand information, is in tension with Congress's decision to place that authority with the Secretary. Furthermore, the requirement that, unless we have rebutting information, the Secretary must assign weights to non-biological impacts based strictly on information from those entities constrains the Secretary's discretion to use their expert judgment and mandate to base designations on the best scientific data available. Prior to the Final Rule, we implemented the Policy and regulations at 50 CFR 424.19—neither of which set forth a rigid ruleset regarding the level of information needed for us to consider excluding areas, the weight we would assign to the information about impacts of designation, or any requirement to exclude areas under certain circumstances. The Service now recognizes that this approach achieved the balance that Congress sought when it enacted section 4(b)(2),

furthering the conservation of the species while still allowing for exclusions of particular areas when the benefits of exclusion outweighed the benefits of inclusion.

Finally, we find that the Final Rule does not accomplish the goal of providing clarity and transparency. Section 4(b)(2) of the Act requires the Service to consider the economic, national security, and other relevant impacts of critical habitat designations. This responsibility makes it particularly important that potentially affected entities, including Federal agencies, Tribes, States, and other relevant stakeholders have a clear understanding of what information is relevant to the Secretary's evaluation of impacts of critical habitat designations and of how that information fits into the exclusion process. Having different 4(b)(2) regulations from those that NMFS applies (i.e., 50 CFR 424.19) could result in different outcomes in analogous circumstances between the two agencies or multiple possible analyses for species over which the Services share jurisdiction (e.g., sea turtle species, Atlantic salmon). This difference poses a significant risk of confusing other Federal agencies, Tribes, States, other potentially affected stakeholders and members of the public, and agency staff responsible for drafting critical habitat designations. We have not identified a science- or mission-based reason for separate regulations for exclusions from critical habitat that would outweigh that risk. Thus, it is preferable for the Service's section 4(b)(2) processes and standards to be consistent with those of NMFS, and it would not make sense for the Service to suggest that NMFS should adopt a framework that we are finding in this rulemaking to be at odds with the purposes, mandates, and structure of the Act. Therefore, we find that the previous approach—in which both agencies follow the joint implementing regulations at 50 CFR 424.19 and the Policy—provides greater clarity for the public and Service staff.

We also considered whether to retain any portions of the regulation. However, the three reasons we identified for rescinding the Final Rule apply to all portions of the regulation. The three reasons are because the Final Rule undermines the Service's role as the expert agency; constrains the Service's discretion and decreases the agency's ability to further the conservation

purposes of the Act; and fails to add clarity or transparency. As discussed in detail in the proposed rule, these reasons apply to all four of the key elements of the regulation—the requirement to undertake an exclusion analysis whenever a proponent of an exclusion provides credible information; the prescription for weighing the impacts; the treatment of Federal lands; and the requirement to exclude any area for which the benefits of exclusion outweigh the benefits of inclusion (86 FR 59346, 59346-51; October 27, 2021). Therefore, removing some combination of these elements and retaining the rest would still constrain the Secretary’s discretion and thereby undermine the Service’s role as the expert agency, decrease the agency’s ability to further the conservation purposes of the Act, and fail to add clarity or transparency.

Even if we revised the standards within any of these elements, the crux of each element would still be to put in place requirements that constrain the Secretary’s discretion and reduce the Service’s ability to further the conservation purposes of the Act. For example, revising the “credible information” standard for triggering the requirement to undertake an exclusion analysis would still require the Service to undertake exclusion analyses in certain circumstances and thus constrain the agency’s discretion to determine whether, based on the facts specific to each species and each potential exclusion, undertaking an exclusion analysis does further the conservation purposes of the Act. Also, replacing the “credible information” standard could merely serve to introduce a different new standard that may decrease clarity like the “credible information” standard does.

Additionally, the only other elements of the Final Rule are already directly addressed even without the regulations—through the Policy and in some cases the requirements of the Act. For example, paragraphs (d)(3) and (d)(4) of the Final Rule are almost entirely identical to sections 3 and 2, respectively, of the Policy. Therefore, if we were to remove all other parts of the Final Rule and retain paragraphs (d)(3) and (d)(4), that new regulation would not add any additional clarity; would be duplicative of, and potentially inconsistent with, those elements in the Policy; and would be confusing for the public as to which standards apply to each aspect of

the Service's exclusion analyses. Furthermore, paragraph (a) of the Final Rule includes non-exhaustive lists of economic impacts and other relevant impacts. Regardless of whether these lists are in regulation, we are required by the Act to consider impacts in these categories. Including these elements in a revised regulation in part or in whole would not change the Service's consideration of impacts under section 4(b)(2) of the Act.

The Final Rule was unnecessary for achieving its intended purpose of increasing clarity and transparency to the public regarding when and how we will exclude areas. The *Weyerhaeuser* decision made clear that we need to explain decisions not to exclude areas from critical habitat, and even before that decision, we acknowledged in the preamble to the Policy that we would do so (81 FR 7234; February 11, 2016) ("If the Services do not exclude an area that has been requested to be excluded through public comment, the Services will respond to this request. However, although the Services will explain their rationale for not excluding a particular area, that decision is committed to agency discretion."). Therefore, we will always explain our decisions not to exclude particular areas for which exclusion has been requested. Our explanation will take into account the best scientific data available, including the strength of the information provided by the proponent in support of the exclusion. Although we stated in the Final Rule that *Weyerhaeuser* (and the accompanying need for clarity and transparency about the analyses underlying our exclusion and non-exclusion decisions) was, in part, its impetus, we will always explain our decisions not to exclude particular areas for which exclusion has been requested, even without the Final Rule in place. The Policy and the regulations at 50 CFR 424.19 already provided sufficient detail regarding the analyses we undertake when considering and conducting exclusions, and we have now concluded that the Final Rule was unnecessary and that it increased confusion and decreased clarity by articulating an approach that differed from both NMFS's approach and the jointly promulgated Policy.

Because we have made the decision to rescind the Final Rule, the Policy and joint regulations are no longer superseded, and the Service's critical habitat and exclusions decisions

will follow the Policy and comply with the regulations at 50 CFR 424.19. In adopting the specific changes to the regulations in this document and setting out the accompanying clarifying discussion in this preamble, the Service is adopting prospective standards only. Nothing in this rescission is intended to require that any previously finalized critical habitat designations or exclusion decisions be reevaluated on the basis of this final decision.

Summary of Comments and Responses

In our proposed rule published on October 27, 2021 (86 FR 59346), we requested public comments on the provisions of the proposed rule. After considering several requests for extensions of the public comment period beyond the original 30 days, we decided to extend the comment period an additional 15 days to December 13, 2021. During the public comment period, we received a request for public hearings. However, public hearings are not required for regulation revisions of this type, and we elected not to hold public hearings.

By the close of the public comment period on December 13, 2021, we had received approximately 29,000 public submissions. We received comments from a range of entities, including individual members of the public, States, Tribes, industry organizations, legal foundations and firms, and environmental organizations. The vast majority of the comments (~28,800) were similar statements from individuals indicating their general support for rescission of the rule.

We reviewed and considered all public comments prior to developing this final rule. We provide summaries of substantive comments and our responses below; we combined similar comments where appropriate. We did not, however, consider or respond to comments that are not relevant and are beyond the scope of this particular rulemaking. For example, we did not discuss and respond to comments regarding our joint proposed rule with NMFS to rescind the regulatory definition of “habitat” (see 86 FR 59353, October 27, 2021). We also received comments that we should revise certain parts of 50 CFR 424.19 (e.g., revisiting the incremental

approach to considering economic impacts of a critical habitat designation; defining economic impact), and certain portions of the Policy (including the treatment of conservation agreements and habitat conservation plans; revising the approach to treatment of Federal lands; requiring formal documentation of exclusion analyses for each designation; and formalizing coordination with relevant State wildlife management agencies, Tribes, and local governments when undertaking a designation of critical habitat). Revising the joint implementing regulations at 50 CFR 424.19 or the Policy is outside the scope of this specific Service-only action.

Comment 1: Commenters stated that the proposed rule is arbitrary and capricious because the Service did not provide a substantive, reasoned explanation for the change of position from the Final Rule.

Response: We acknowledge the well-established principle that agencies must provide a reasoned explanation for its changes in position. *E.g., Coalition*, 2022 WL 1073346, at 12 (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016)). We have satisfied that requirement in this final rule and in the proposed rule. We refer the commenters to the proposed rule section “Rationale for Rescission” and the summary in this final rule, both of which set forth our detailed explanation for rescinding the Final Rule. To summarize, we now find three ways in which the Final Rule is problematic. First, it potentially limits or undermines the Service’s role as the expert agency responsible for administering the Act because it potentially gives undue weight to outside parties in guiding the Secretary’s statutory authority to exclude areas from critical habitat designations. Second, it constrains the Service’s discretion because it employs a rigid ruleset in all situations regardless of the specific facts as to when and how the Secretary will exercise the discretion to exclude areas from critical habitat designations. Finally, it does not accomplish our previously stated goal of providing clarity and transparency.

Comment 2: Commenters stated that rescinding the Final Rule will negatively affect those who might make decisions in reliance on application of the Final Rule now (e.g., third parties having reliance interests).

Response: The Final Rule became effective on January 19, 2021. On January 20, 2021, the President issued E.O. 13990 and an associated Fact Sheet with a non-exhaustive list of agency actions, directing the Services to review the Final Rule and other regulations. The Service publicly announced on June 4, 2021, that they would propose to rescind the Final Rule. In the proposal to rescind the rule, we did not identify any affected reliance interests because we were unaware that any existed, especially due to the rule's limited practical applicability and the limited time it has been in effect.

Although several commenters expressed the possibility that there may have been reliance on the Final Rule, none provided any specific examples of actual reliance, nor did any articulate why such reliance would have been reasonable given the limited time that elapsed between the Final Rule's effective date and when it was identified for reconsideration. The Final Rule has been in place for a relatively short time and has a potential applicability on a small number of critical habitat designations. We did not identify any instances of a third party making a decision relying on application of the Final Rule with outcomes anticipated to be different than if we relied on the regulations at 50 CFR 424.19. Even if there has been reliance on the Final Rule, any information gathered by proponents of an exclusion and submitted to the Service after the Final Rule is rescinded would be fully considered under 424.19 regulations and the Policy. Therefore, we conclude that rescinding the Final Rule and resuming implementation of the regulations at 424.19 and the Policy will not affect any reliance interests.

Comment 3: Commenters suggested that in proposing the rescission, the Service did not allow sufficient time for implementation and evaluation of the effects of the regulation. The Service did not provide examples of how the Final Rule has constrained the agency discretion or

led to decisions that are contrary to the Act or other Federal policy. Furthermore, the Service's rationale for rescission is largely unsupported, inconsistent with the Act, and is not capable of being "ascribed to a difference in view or the product of agency expertise."

Response: We acknowledge that the Final Rule has been in place for a relatively short time and only has a potential bearing on the potentially limited set of designations where there is a factual basis to support exclusions of particular areas. Nevertheless, although there has been limited opportunity for the Service to provide tangible examples of how this regulation has affected a particular designation, we do not need to wait until we have evidence of such effects in order to rescind the Final Rule that we now conclude was ill-advised. The Federal Government does not require that regulations must have been in place for a period of time for an agency to have the authority to rescind them, nor must an agency provide examples of when a regulation caused confusion. Rather, the standard for rescinding previous regulations is the same standard as for promulgating new regulations, and we have met that standard—making a reasonable decision and providing an explanation for the decision that draws a rational connection between the facts found and the decision made.

Executive Order 13990, issued on January 20, 2021, provided the impetus for our review of the Final Rule. We are rescinding the Final Rule on the basis of our legal authority under the Act (16 U.S.C. 1531 et seq.). We have provided a rational explanation in the proposed rule and in this document detailing the multiple reasons why we are rescinding the Final Rule. After reviewing the regulation and its preamble, we find the Final Rule to be problematic because it unduly constrains the Service's discretion in administering the Act, potentially limiting or undermining the Service's role as the expert agency. We also found that the rigid rule sets in the Final Rule constrain the Service's ability to further the conservation of endangered and threatened species through designation of their critical habitats. Moreover, rather than providing clarity and transparency, the Final Rule introduces additional confusion. Because these shortcomings cannot be addressed by putting further effort into revising the Final Rule, we have

determined that it is in the best interests of stakeholders and for the conservation purposes of the Act to minimize the time that the Final Rule is in effect by swiftly rescinding it.

Comment 4: Commenters noted that, in their opinion, the Final Rule greatly increased transparency of the exclusion process because it gave substance to the Service's decisionmaking process and allowed Federal agencies, Tribes, States, and other stakeholders to know how the Service will weigh factors when considering exclusion from critical habitat. Further, commenters stated that one benefit of the Final Rule was helping to ensure that the Service provides sufficient justification for exclusion decisions, and the Service has not explained how making the process more difficult to follow by returning to the Policy would address the Service's concerns about needing to be more "deliberate and transparent" in decisionmaking regarding exclusions from critical habitat. Additionally, commenters stated that, if the Final Rule is rescinded, regulatory transparency will be reduced, and this situation would be inconsistent with the Supreme Court ruling in *Weyerhaeuser* because decisions regarding exclusion would be shrouded by agency discretion until and unless a party seeks judicial review. Additionally, counter to the Supreme Court ruling, the Policy specifically states that decisions not to exclude particular areas from critical habitat are committed to agency discretion and therefore not subject to judicial review.

Response: As described above, we will resume implementation of the Policy and 50 CFR 424.19, which set forth a stepwise approach to conducting the mandatory considerations of the economic impact, the impact on national and homeland security, and other relevant impacts of the designation of critical habitat without unduly constraining the Service's discretion as to when to exclude areas under section 4(b)(2) of the Act. The primary focus of the Policy describes how we consider "other relevant impacts," including conservation plans and partnerships, when designating critical habitat, which is similar to how the Final Rule addressed these issues. Because the Policy does not limit our consideration of information in an exclusion analysis, it allows us to consider any fact pattern for exclusion that may be raised by

commenters, including the categories of “other relevant impacts” defined by the Final Rule. By removing the Final Rule, we are not removing our responsibility to evaluate information and make a rational decision regarding exclusion of particular areas. Nor will rescission of the Final Rule result in less transparency or inconsistency with *Weyerhaeuser*, as the commenter asserts. Rather, we will continue to critically evaluate information presented by proponents of exclusion and will decide whether to enter into a discretionary exclusion analysis based on reasonable and reliable information regarding potential impacts of designating critical habitat. Finally, even though the Policy states that decisions not to exclude are not reviewable, we recognize the Supreme Court’s ruling in *Weyerhaeuser*, and we will continue to explain our decisions not to exclude particular areas from designations of critical habitat for which exclusion has been requested.

Comment 5: Commenters noted that if, as the Service claims, the phrase “credible information” is vague, then in comparison the phrase “best available information” is no clearer. Additionally, contrary to the rationale in our proposal to rescind the Final Rule, there is nothing vague about commonly understood terms. Commenters also noted that there was no discussion of the “confusion” noted in the proposed rule, but there should be, including who was confused, whether the confusion was resolved, and whether it was well-founded.

Response: The phrase “credible information” is only part of the regulatory language included in § 17.90(c)(2)(i) of the Final Rule, and the entirety of what we refer to as the “credible information standard” is: “credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area.” We find multiple parts of this standard to be vague. For instance, “a benefit of exclusion” could be interpreted to mean almost anything to a proponent of an exclusion, which we find to be unhelpful and vague as the basis for the standard to judge whether the Service should enter into the discretionary exclusion analysis. In addition, the word “meaningful” is subjective and open-ended in this context.

We do not mean to suggest that any degree of vagueness is disqualifying for regulatory language. But when the stated goals of a regulation include clarity and transparency, the degree of vagueness is at least relevant to considering the efficacy of the regulation. We do not agree that the phrase “best scientific data available” is as vague as the phrase “credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area.” The phrase “best scientific data available” is the standard in the Act that applies to the designation of critical habitat, and numerous court decisions have clarified what constitutes the best scientific data available. The courts have made clear, for example, that the phrase “on the basis of the best scientific data available” establishes a standard that “prohibits [the Service] from disregarding available scientific data that is in some way better than the evidence it relies upon”; the standard also allows the Service to rely on data that qualifies as the best scientific data available even if that data is quite inconclusive. *E.g., Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080-81 (9th Cir. 2006); *City of Las Vegas v. Lujan*, 891 F.2d 927, 933 (D.C. Cir. 1989); *Southwest Center for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000).

Upon our review of the Final Rule, we determined that establishing a new information standard that could be interpreted differently from the standard in the Act does not meet our stated goal of transparency and clarity. The Service has a long-standing track record of basing our classification decisions and critical habitat designations on the best scientific and commercial data available, and we find that it is unnecessary and confusing to define a separate information standard for the purposes of section 4(b)(2) exclusion analyses.

Comment 6: Commenters stated that the “credible information” standard appropriately placed the burden on the Service for evaluation of information used in exclusion analyses and that the Final Rule properly ensures evaluation of exclusions where credible information is presented. Furthermore, commenters noted that if, as the Service claims, even without the Final Rule the Service is already required to consider reasonable information presented by a proponent

of an exclusion, there would be no additional burden of considering that information under the “credible information” standard. The Service appears to misread both the Act’s data standard as well as the Final Rule’s “credible evidence standard” when asserting that the credible information standard is in conflict with the Act’s best scientific and commercial data available standard.

Response: We agree with the commenter that we must assess information submitted in support of a potential exclusion regardless of whether the Final Rule is rescinded. While the Policy does not contain a requirement to consider and evaluate information submitted in support of exclusions, we will always evaluate information submitted by proponents of exclusions as mandated by section 4(b)(2) of the Act to consider “other relevant impacts.” Additionally, the Policy sets forth general guidelines for considering certain types of information and establishes a preference for assigning “great weight” to certain types of fact patterns, including demonstrated partnerships, including those with Tribes; the existence of operative conservation plans permitted under section 10 of the Act; and national-security and homeland-security impacts. The Policy also allows consideration of other fact patterns that may provide a rational basis by which we may exclude particular areas of critical habitat.

Furthermore, we are aware that, under the *Weyerhaeuser* ruling, any time that we make a decision not to exclude a particular area, that decision will be judicially reviewable for abuse of discretion. Therefore, in the final rule for any particular critical habitat designation, we will clearly explain the basis for our decision not to exclude any particular area for which exclusion has been requested. The commenter asserts that we misread the Act’s data standard, as well as the Final Rule’s “credible evidence” standard; however, we did not use the phrase “credible evidence” (the term in the regulation is “credible information”) and have only described the “best scientific data available” standard as the one that applies to the process of designations of critical habitat. We did not state that the “credible information” standard conflicts with the “best

scientific data available”; rather, we stated that having a different, and vague, standard is not helpful, nor does it increase transparency.

Comment 7: Commenters stated that, even with the provision of the Final Rule giving weight to economic and other non-scientific analyses consistent with the weights described by exclusion proponents, there would be no impact on the Service’s evaluation of scientific or biological information. They asserted that, contrary to the position of the proposed rescission rule, the Final Rule protects the Service’s discretion as to when an exclusion analysis would be undertaken and what information would be considered in that analysis. Taken together, the Final Rule makes clear that the Service is the ultimate arbiter of whether a particular area should be excluded and retains the Service’s ability to rely on the best scientific data available and even to rebut non-biological data submitted by outside parties.

Response: The Final Rule provides that the weight given to non-biological impacts will be consistent with purported expert or firsthand knowledge unless the Secretary has information to rebut that weight. We do not agree that the Final Rule protected the Secretary’s discretion as to when an analysis would be undertaken. Because the credible-information standard in the Final Rule is a low bar, in cases where a proponent presents any benefit of exclusion, regardless of the level of impact, the Service would be committing to enter into a discretionary exclusion analysis absent any information to rebut. And further, once in the discretionary exclusion analysis, if the analysis concluded that the benefits of exclusion outweigh benefits of inclusion, the Service would be committing to exclude that area, unless the exclusion would result in the extinction of the species. Thus, we also disagree with the commenters that the regulations taken together protected discretion as to when we would exclude. We would be required to weight impacts based on information that outside proponents provide and then required to exclude any area for which the weight of the impact is greater, or merely appears greater based solely on the expert or first-hand information that the proponents provide, than the weight of the benefits of

inclusion. Therefore, it does not logically follow that the Service would be the “ultimate arbiter” of whether a particular area should be excluded.

Comment 8: Commenters stated that the Service has expertise in a wide array of biological science disciplines but that the agency does not have a similar expertise in areas such as economics, finance, employment, or community planning. This lack of expertise is demonstrated by the fact that the Service routinely uses outside contractors to assess the potential economic impact of critical habitat designations. Commenters also stated that, by rescinding the Final Rule, the Service is assuming that other entities do not have more expertise in certain subjects and that the agency is implying that it alone has the requisite conservation expertise and knowledge of the Act to support critical habitat exclusions. Similarly, commenters stated that the Final Rule does not give undue weight to outside parties, citing the review of information submitted in the petition process as an example of where the Service already reviews and evaluates information from outside parties. A commenter stated that Congress recognized the need for outside coordination with State, Tribal, and local governments, in particular in section 6 and other provisions, when drafting the Act.

Response: We acknowledge that we regularly use outside entities to develop economic analyses of critical habitat designations. We also routinely seek out expertise from community planners to get the best available information as it pertains to development projects within areas that support the conservation of the species. As part of our normal process, we incorporate all of this information into our draft economic analysis, and we make it available with the proposed critical habitat designation for public comment; we further consider any additional comment and information related to the economic analysis when we finalize critical habitat rules. When we receive comments and information from proponents of an exclusion, we always consider their comments regarding potential impacts from the designation of critical habitat to their activities or operations. It is our responsibility to evaluate the information, assign appropriate weights to any impacts in light of the information we have received, and weigh those impacts against the

benefits of designating any areas as critical habitat so that we can ensure that critical habitat designations contribute to the conservation of species and further the conservation purposes of the Act. We agree with the commenter that Congress recognized the importance of coordination with State, Tribal, and local governments; therefore, we make it part of our process to coordinate with stakeholders throughout the process of designating critical habitat. Rescinding the Final Rule and resuming implementation of the Policy and 50 CFR 424.19 will not change this important aspect of our process to designate critical habitat.

Comment 9: Commenters stated that reverting to the Policy does not remove issues with weighting of impacts because the Policy states the Service will “give great weight” to certain types or categories of impacts.

Response: The phrasing in the Policy noted by the commenter, “give great weight,” is an indication of how we intend to weight impacts in those instances. The Policy includes categories of impacts where we intend to “give great weight” to the benefits of exclusion for situations where we have a general knowledge and experience that the benefits of exclusion may outweigh the benefits of inclusion. This phrase intends to be transparent, without being predecisional, about how we will weight information in the discretionary exclusion analysis. It also preserves discretion because it specifies that the Secretary will “give great weight” to particular concerns “in analyzing the benefits of exclusion.” In contrast, the Final Rule requires the Secretary to give a weight that is consistent with purported expert or firsthand information received from outside parties, which has the effect of delegating to those outside parties the Service’s authority to weight the specified categories of impacts when we analyze the benefits of inclusion.

Comment 10: A commenter suggested that by instituting a process for soliciting and considering outside expertise, the Final Rule facilitated the requirement in the Act to use the best scientific and commercial data available in making decisions regarding critical habitat

designations. If the Service rescinds the Final Rule, it would undercut the statutory mandate to use the best scientific and commercial data available.

Response: As part of our routine process in designating critical habitat, regardless of the status of the Final Rule, we consider all comments and information submitted by proponents of exclusions of specific areas from critical habitat designations. Rescinding the Final Rule will not undercut our requirement to base our designations on the best scientific data available (considering the economic, national security, and other relevant impacts) when making determinations for critical habitat because we have always solicited information regarding the impacts of critical habitat designations from stakeholders through the rulemaking process and will continue to do so in the future.

Comment 11: Some commenters expressed concern that the commitment to consider non-biological impacts identified by State or local governments in the Final Rule would no longer be in place if the Final Rule is rescinded. This outcome would potentially be in tension with the Act, which states the Secretary is required to “cooperate to the maximum extent practicable with the States” and would discount local knowledge about impacts. Specifically, a commenter noted that the current administration’s commitment to including traditional ecological knowledge in Federal decisionmaking is a marked contrast to the proposed rule’s criticism of giving local communities an outsized role in critical habitat designations.

Response: With the rescission of the Final Rule, we will continue to consider non-biological impacts identified by State or local governments or Tribal entities just as we did before the Final Rule was in place. Section 4(b)(2) of the Act mandates that we consider the economic and other relevant impacts of designating critical habitat. Our regulations at 50 CFR 424.19 and the Policy (e.g., provisions 4 and 7) allow us to consider the potential impacts to these entities. To comply with this mandate, we always conduct an economic analysis of the proposed designation, which includes, if appropriate, the incremental impact of a designation of

critical habitat to State or local governments or Tribal entities. In addition, we make our economic analysis available with the proposed designation of critical habitat and solicit public comments on both. Through this public notice-and-comment process, we address all comments received and ensure that we have considered all relevant impacts, including any impacts to State or local governments or Tribal entities.

Secretarial Order 3206, “American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act” (June 5, 1997) acknowledges that we consider traditional knowledge (TK) in Federal land management decisionmaking. Since the issuance of S.O. 3206, we have routinely considered TK in the process of designating critical habitat. Our use of TK is a matter of using the best available information to inform our decisionmaking. Rescinding the Final Rule does not change our commitment to considering impacts identified by State or local governments or Tribal entities or to following the guidelines in S.O. 3206.

Comment 12: Multiple commenters disagreed with our proposal to return to the Policy’s approach to treatment of Federal lands in designations of critical habitat. They further stated that we should retain the same treatment of lands regardless of ownership, in part because the Act’s requirement to consider economic impacts, the impact on national security, and other relevant impacts is not limited to specific land ownership. At least one commenter expressed concern that the Policy does not provide for non-Federal permittees, lessees, or contractors to request exclusions based on economic impacts. Some stated that the Act, other regulations, or courts do not require Federal land to be designated as critical habitat. Others stated that we did not provide adequate rationale for the change from the Final Rule to proposing to adopt the Policy’s approach on Federal lands. Other commenters noted that prioritizing inclusion of Federal lands in critical habitat was reasonable. Some said that because Federal land management decisions necessarily have the Federal nexus required to trigger consultation, a designation on Federal lands is more likely to result in some benefit to the species. At least one commenter found this to

be reasonable based upon the affirmative duties of Federal land managers under section 7(a)(1) of the Act.

Response: Upon returning to implementing the Policy, we will continue to consider the economic impacts, the impacts on national security, and any other relevant impacts regardless of landownership as required in the Act. The Policy does not limit what exclusions proponents may request, nor does it prohibit the Service from excluding particular areas on the basis of fact patterns not enumerated in the Policy. Rather, the Policy sets out general principles and considerations that guide the Service's exclusion analyses. The Policy states that Federal lands should be prioritized to support the recovery of species, because there is always a nexus for section 7 consultation on Federal lands; in addition, by generally not excluding Federal lands, any real or perceived regulatory burdens on non-Federal lands can be minimized. However, nothing in the Policy requires that Federal lands be categorically designated as critical habitat, and the Policy does not prohibit exclusion of Federal lands. Therefore, depending on the species-specific and situation-specific facts, we may exclude areas of critical habitat from designations on Federal lands, but the Policy indicates that in most cases we would expect that the benefits of inclusion of Federal lands would be greater than the benefits of exclusion.

As stated in the proposed rule, the Secretary would retain the discretion to exclude Federal lands when the factual circumstances merit it. We find that the approach in the Policy better equips the Service with the flexibility necessary to account for the wide variability of circumstances in which the Secretary makes exclusion decisions—variability in the needs of the species, in the geography and quality of critical habitat areas, and of land-ownership arrangements. For example, while the transactional costs of consultation with Federal agencies tend to be a relatively minor cost in most situations, and while activities on Federal lands automatically have a Federal nexus (which usually would require consultation and thus increase the potential for conservation benefits if those lands are designated), we have found that in some instances the benefits of exclusion nevertheless outweigh the benefits of designating those

areas. In those situations when the benefits of excluding Federal lands outweigh the benefits of designating them as critical habitat, the Policy provides sufficient discretion for the Secretary to exclude Federal lands. The rescission of the Final Rule will not change our mandatory consideration of those impacts on Federal lands. Further, consistent with *Weyerhaeuser*, in those situations where we consider exclusion but do not exclude particular areas, we will explain our rationale for not excluding particular areas for which exclusion has been requested. We refer the commenter to the rationale in the proposed rule and in this final rule, both of which set forth our detailed explanation for rescinding the Final Rule.

Comment 13: Commenters stated that, prior to the Final Rule, the Service implemented the Act in a manner that effectively removed the requirement that the Service consider economic and other impacts of critical habitat designations. Other commenters disagreed that the Service's consideration of economic and other factors is at all discretionary under section 4(b)(2) of the Act. They suggested that, after conducting a balancing analysis, if the Service concludes that the benefits of exclusion outweigh those of inclusion, then the reasonable conclusion is that the area should be excluded so long as the exclusions will not result in the extinction of the species. These commenters stated that if the Service is seeking to retain discretion not to exclude an area when the benefits of exclusion outweigh those of inclusion, this justification is incompatible with the Act, and unsupportable under the APA.

Response: The Act does not require us to undertake an exclusion analysis; however, section 4(b)(2) of the Act requires that we consider the economic impact, the impact on national security, and any other relevant impacts. We have and will continue to comply with this mandatory consideration prior to finalizing any designation of critical habitat. The implementing regulations at 50 CFR 424.19 also require that we make available the draft economic analysis concurrent with each proposed critical habitat designation. We have, and always will, consider the economic impact of designating critical habitat, and we do that through completing an economic analysis of each designation of critical habitat, and then considering that economic

analysis in deciding whether to engage in an exclusion analysis under the second sentence of section 4(b)(2).

By the express language in section 4(b)(2) in the Act, other aspects of exclusion decisions are discretionary. For example, the Secretary has discretion on when to undertake an exclusion analysis, the assignments of weights, and making the final exclusion decision. Simply weighting every non-biological impact according to outside parties could constrain the Secretary's discretion and could conflict with the conservation purposes of the Act and our responsibility to implement the Act. Therefore, we do not intend to delegate to outside parties our authority to assign weights to non-biological impacts. If, after weighting and weighing the benefits of inclusion and the benefits of exclusion, we determine that the benefits of exclusion outweigh those of inclusion and that exclusion would not result in the extinction of the species, we agree that exclusion is generally appropriate.

However, determining the benefits of exclusion and the benefits of inclusion is not always straightforward. Benefits of exclusion are primarily the avoidance of economic costs (e.g., the incremental costs associated with consultations related to impacts to critical habitat and potentially implementing reasonable and prudent alternatives). Benefits of inclusion are generally the support of conservation and recovery of species (e.g., the requirement of Federal agencies to ensure that actions that they fund, authorize, or carry out are not likely to result in the destruction or adverse modification of any designated critical habitat). Including a particular area within critical habitat may also have one or more other benefits, potentially including indirect benefits. While some of these benefits of inclusion can be quantified and monetized, others may be hard to quantify or monetize but may nevertheless be significant. Often, the weighing analysis requires a comparison of the benefits of avoiding quantified economic costs against the benefits of maintaining qualitative value for conservation and recovery. Comparisons such as these are not precise, and it may not be obvious that the benefits of inclusion outweigh

those of exclusion. But we do not take this relative imprecision to suggest that conservation benefits are any less important or worthy of inclusion and consideration when weighing costs and benefits. Indeed, insofar as we may not be able to quantify precisely the incremental benefits of a designation of critical habitat, retaining the discretion not to exclude an area even if the quantified benefits of exclusion appear to outweigh the quantified benefits of inclusion allows the Service to account for those kinds of imprecisions.

Further, the statute specifically states that the decision to exclude is discretionary: “The Secretary *may* exclude any area from critical habitat” (*emphasis added*). Finally, the decision in *Weyerhaeuser* acknowledged that the Service has discretion to exclude so long as the exclusion is reasonably applied and supported by the decisional record. Additionally, the decision in *Weyerhaeuser* made clear that a decision not to undertake an exclusion analysis is reviewable for abuse of agency discretion. Therefore, if we do not undertake an exclusion analysis despite a request for exclusion or supporting information having been submitted, we will explain our rationale, and any reviewing court could review our decision and determine whether we abused our discretion. For any exclusion decisions, we will fully explain our rationale and provide a detailed explanation of our analysis consistent with the requirements of the APA.

Comment 14: Some commenters stated that the Final Rule does not limit the Service’s ability to conserve listed species in any areas that would be excluded from a designation of critical habitat if the “shall” exclude language is retained in regulation. The Service would retain the flexibility to consider the specific facts at issue or the conservation outcomes on a fact-specific basis with the Final Rule in place.

Response: As described in the preamble to both the proposed and this final rule, we find that the “shall exclude” language of the Final Rule constrains the Secretary’s discretion once we make a determination that the benefits of exclusion outweigh, or appear to outweigh based on the expert or first-hand information that proponents provide, the benefits of inclusion. Congress

clearly did not intend to constrain the Secretary’s discretion in this manner, or the Act would not contain the provision that the Secretary “may exclude.” Furthermore, the Solicitor’s Memorandum Opinion M–37016, “The Secretary’s Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act” (the Solicitor’s M-Opinion; October 3, 2008), underscores the Secretary’s discretion to exclude areas as a result of the statute’s inclusion of the phrase “may exclude” (pp. 6–9). We also find that the “shall exclude” language, combined with the allowance of weights of impacts to be determined by outside parties, is likely to further constrain the Secretary’s discretion in certain cases. We recognize regulations are intended to interpret statutory language that they implement. The Final Rule stated that the “shall exclude” language was an exercise of Secretarial discretion. However, in this instance, we find that the way in which the Final Rule constrains the Secretary’s discretion is potentially in conflict with our responsibilities to administer the Act and fails to take into account the species-specific and situation-specific facts that are necessary to ensure that critical habitat designations contribute to the conservation of listed species.

Comment 15: Some commenters stated that the Service’s approach to critical habitat designations must reflect the requirements of section 4(b)(2) of the Act in consideration of the economic impact and relative benefits before deciding whether to exclude an area from critical habitat.

Response: The Act in section 4(b)(2) and our implementing regulations at 50 CFR 424.19 set forth clear requirements for considering the economic impact, the impact on national security, and any other relevant impacts of including particular areas within designated critical habitat. We always comply with this mandatory obligation to consider these impacts prior to finalizing any designation of critical habitat. Rescinding the Final Rule will not change our practice of considering these impacts or eliminate the statutory requirement to consider these impacts. We find that rescinding the Final Rule better reflects the requirements of section 4(b)(2) of the Act because applying 50 CFR 424.19 and the Policy will retain the requirement to

consider the mandatory impacts and preserve the Secretary's discretion to exclude particular areas if the benefits of exclusion outweigh the benefits of inclusion, so long as exclusion will not result in extinction of the species.

Comment 16: Commenters stated that the economic impact of a designation of critical habitat is an important consideration, but by itself the economic impact can fail to capture the broader impact of a critical habitat designation on a community. Commenters contend that a flaw with the proposed rescission is that removing the discussion of what "other relevant impacts" includes may cause impacts to communities to take a back seat in exclusion analyses.

Response: Under section 4(b)(2) of the Act, "other relevant impact" is a separate entity in the text and has equal importance with "economic impact" and the "impact on national security." We always consider these categories of impacts, and rescinding the Final Rule will not change that approach. The Policy describes the types of categories of impacts that we may consider when evaluating the impacts of a critical habitat designation. The Policy provides examples such as plans and partnerships, but in no way excludes considerations of impacts to communities. Furthermore, the Solicitor's M-Opinion thoroughly describes the Secretary's broad discretion to determine what other relevant impacts might be relevant (p. 12). If we receive requests for exclusion of particular areas from a designation of critical habitat based on impacts to communities, we will fully consider that information and provide a rational basis to support our decision to exclude or not exclude based on this or other available information.

Comment 17: Some commenters stated that the Service must consider how imposition of costs on private landowners will affect their incentive to conserve, maintain, or restore habitat for species. Conversely, the Service must also consider the conservation costs of critical habitat—that is, whether landowners may preemptively destroy habitat or forgo restoration to prevent habitat features from developing or to avoid perceived stigma effects of a designation.

Conservation benefits also need to be considered, but the Service often concludes designations of critical habitat will have little benefit.

Response: The designation of particular areas as critical habitat does not impose obligations to conserve, preserve, or restore any area designated as critical habitat for a species. Where there is a Federal nexus, the Federal agency must ensure their actions do not destroy or adversely modify designated critical habitat. We are aware that there may be perceptual effects that result in economic impacts. For example, people may be reluctant to purchase lands that are identified as critical habitat, or landowners may change their land use or planning as a result of the area being designated as critical habitat. Our economic analysis evaluates the potential for those effects, and we describe the perceptual effects in our analysis. Actions taken to preemptively destroy habitat or to prevent habitat features from developing to prevent an area from being considered as critical habitat could result in a violation of section 9 of the Act even if an area is not designated as critical habitat.

We also recognize that there can be some risk to species or their habitat associated with drawing lines on a map to define areas of critical habitat but acknowledge that the effects from section 7 consultation provide a conservation benefit. In some instances, we will determine that a designation of critical habitat is not prudent because there is evidence of a threat of collection of the species or other threats would be exacerbated due to the publication of maps detailing the location of the species.

In instances where critical habitat is proposed, we look for the existence of partnerships, plans, or agreements that may provide a conservation benefit for the species. If appropriate, and after conducting an exclusion analysis, we may find that the benefits of exclusion outweigh the benefits of inclusion. So long as the exclusion will not result in the extinction of the species concerned, we have always excluded such areas. These conservation mechanisms incentivize landowners to enter into these types of agreements to further the conservation of species.

Additionally, our economic analysis includes an assessment of the benefits of the designation of critical habitat, and where possible we quantify those benefits; however, in most cases we qualitatively describe the benefits in terms of conservation value of the designation of the particular areas of critical habitat.

Comment 18: Several commenters found our argument that having different regulations than NMFS created confusion to be unpersuasive. Some stated that the Final Rule would result in the Service being more similar to NMFS in terms of actually conducting exclusion analyses and that absent the regulations there would be no binding guidance or requirement for the Service to comply with section 4(b)(2) of the Act. Commenters stated that wanting to be consistent with NMFS is not a compelling rationale and cited the Service's June 4, 2021, intention to return to using blanket 4(d) rules, which would then be inconsistent with NMFS' approach.

Response: As discussed above, differences with NMFS poses a significant risk of confusing other Federal agencies, Tribes, States, other potentially affected stakeholders and members of the public, and agency staff responsible for drafting critical habitat designations. We have not identified a science- or mission-based reason for separate regulations for exclusions from critical habitat that would outweigh that risk.

Whether it is confusing to the public if the Service applies different regulations than NMFS depends on the standards and processes contained in each particular regulation. In some situations, the regulated community is best served if the agencies have the same regulations and policy; this scenario applies to the regulations that make clear to proponents of exclusions how the information they submit will be considered, because consistency makes it easier for proponents of exclusions or other members of the public to know what information to submit. However, in other situations it may make sense for the Service and NMFS to apply their own regulations; this approach applies to regulations under section 4(d) of the Act, because the

protection needs vary between species, and the nature, scope, and scale of the protective regulations that are needed for marine species subject to NMFS' jurisdiction may differ considerably from the needs of species subject to the Service's jurisdiction. In addition, regardless of whether the Service reinstates "blanket" 4(d) rules, we will undertake a species-specific analysis to determine what protections are necessary and advisable for the species at hand as described in section 4(d) of the Act, resulting in a similar process as NMFS uses.

After rescinding this regulation, both Services will apply the implementing regulations at 50 CFR 424.19 and the Policy. This will avoid the potential for different implementation of section 4(b)(2) of the Act between the agencies and for confusion on the part of proponents of exclusions regarding what information to submit and what to expect from the exclusion process.

With the rescission of the Final Rule, the Service will continue to comply with section 4(b)(2) of the Act when designating critical habitat. The Service routinely conducts exclusion analyses: more than 40 percent of our final critical habitat rules have exclusion analyses. Regardless of any regulation, we must document our rationale for decisions not to exclude areas from critical habitat in the face of requests for exclusions because the *Weyerhaeuser* decision held that decisions not to exclude are judicially reviewable.

Comment 19: Commenters stated that the Service should affirm that we will give meaningful consideration to information provided by Alaska Native Corporations (ANCs) and will address impacts on lands owned by Alaska Natives, including lands covered by the Alaska Native Claims Settlement Act, when designating critical habitat.

Response: We value information provided by ANCs and will always consider comments and information provided by ANCs when we are proposing and finalizing designations of critical habitat. We consider impacts on all native-owned lands, including on lands owned by Alaska Natives, to categorically fall within the other relevant impacts that section 4(b)(2) of the Act requires that we consider when designating critical habitat. We will always consider requests for

exclusion from ANCs, and any decision not to exclude will be fully explained in our final rule consistent with the *Weyerhaeuser* ruling.

Comment 20: Numerous commenters stated that the Service should revise the Final Rule rather than rescind it in its entirety, consistent with Supreme Court rulings (e.g., in *Dep't of Homeland Security v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020) (*Regents*) and *FCC v. Fox Television*, 129 S. Ct. 1800 (2009) (*Fox Television*)). In some instances, commenters included specific suggestions to keep existing regulatory language, add new regulatory language, and revise or clarify particular provisions of the regulations. For example, some commenters suggested that we add additional examples of categories that could be considered as bases for exclusions, requested that we clarify when the rigid ruleset would not be appropriate to use, or asked that we further define terms such as “national security.” In other cases, the commenters did not provide detailed recommendations. Others noted that the Service should retain the Final Rule and that NMFS should adopt corresponding regulations.

Response: We reviewed and considered all suggestions of how to revise the regulations instead of rescinding them. We find that the suggestions of specific possible revisions or clarifications support our conclusion that the Final Rule did not provide the clarity or transparency that was intended. For example, there would be no need to identify additional bases for exclusions, eliminate the rigid rulesets in the Final Rule, or define additional terms if we rescind the Final Rule and instead implement the Policy and 50 CFR 424.19 because those authorities properly balance the goals of transparency and predictability of process with the benefit of preserving the Secretarial flexibility and discretion to exclude areas from designations of critical habitat for listed species. With respect to the comments seeking revision instead of rescission without providing specific recommendations on how to revise the Final Rule, we did not further address those commenters because there was not enough specificity to evaluate.

As explained earlier, we have considered whether to retain any portions of the regulation. However, the three reasons we identified for rescinding the Final Rule apply to all four of the key elements of the regulation: (1) the requirement to undertake an exclusion analysis whenever a proponent of an exclusion provides credible information; (2) the prescription for weighting the impacts; (3) the treatment of Federal lands; and (4) the requirement to exclude any area for which the benefits of exclusion outweigh the benefits of inclusion. Revising any of the standards in these elements, or even removing some combination of these elements and retaining the rest, would still result in constraining the Secretary's discretion and decreasing the agency's ability to further the conservation purposes of the Act, and would be unlikely to increase clarity or transparency. Additionally, the other elements of the Final Rule are already directly addressed even without the regulations—through the Policy and in some cases the requirements of the Act. Including these elements in a revised regulation in part or in whole would serve only to create additional confusion without changing or clarifying the Service's consideration of impacts under section 4(b)(2) of the Act.

We note also that this rescission is different from the rescissions addressed in the court decisions that commenters referenced. For example, unlike the rescission in *Regents*, this rescission will not “eliminate the centerpiece of” the critical habitat program or the consideration of exclusions from critical habitat designations. *See Regents*, 140 S. Ct. at 1913 (where DHS rescission had entirely eliminated both the forbearance and the benefits aspects of the DACA program but had only analyzed the benefits aspects). Rather, the Service would be required to continue to consider the impacts of critical habitat designations and would simply return to applying the 2016 Policy in considering exclusions from critical habitat. In addition, this rescission does not affect a right under the First Amendment. *See Fox Television*, 129 S. Ct. at 1805-06 (requiring that, in regulation of speech, FCC put in place the “least restrictive alternative”).

After thoughtful consideration of the specific revisions commenters have suggested, as well as of the possibility of rescinding only parts of the Final Rule or revising instead of rescinding the Final Rule in its entirety, we conclude that the conservation purposes of the Act are best served by promptly rescinding the Final Rule and resuming implementation of 50 CFR 424.19 and the Policy.

Regarding commenters' suggestions that NMFS adopt regulations corresponding to the regulations the Service adopted, we are not in a position to compel NMFS to adopt regulations similar to the ones we are rescinding with this final rule; nor would it further the policies of the Act for the Service to urge NMFS to adopt a framework at odds with the purposes, mandates, and structure of the Act.

Comment 21: A commenter contends that we have violated Executive Orders 12866 and 13563 because the public participation effort simply consisted of an abbreviated public comment period, no public hearings, and no focused stakeholder outreach.

Response: Section 6(a)(1) of E.O. 12866 states that in most cases rules should include a comment period of not less than 60-days. Due to the agreement for a long-term stay in litigation on this rulemaking, development and review of this final rule was completed on an expedited timeframe which included shortening the public comment period to a total of 45 days. In addition to holding a 45-day public comment period and responding to all of the comments received, the Service, pursuant to E.O. 12866, submitted the proposed rule and this final rule to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) for review. Under E.O. 12866, OIRA and the issuing agency meet with any interested party to discuss issues related to a rule under review, and during the proposed and final rule reviews, we participated in several such meetings. In addition, we held three separate webinars for Tribes and Tribal organizations to provide an overview of, and information on how to provide input on, a series of rulemakings related to implementation of the Act that the Services were developing,

including the proposed rule to rescind the Final Rule. We note that public hearings are not required for implementing regulations, and we declined to hold optional public hearings that were requested for this rulemaking.

Comment 22: A commenter stated that we should have conducted an analysis under the Regulatory Flexibility Act (RFA) because the vast majority of business concerns involved in the forestry industry in Alabama are small businesses that could be economically affected by critical habitat designations.

Response: We complied with the requirements of the RFA. No regulatory flexibility analysis is required if the head of an agency, or their designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Small Business Regulatory Enforcement Fairness Act of 1996 amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. In the proposed and this final rule, we certify that the rescission of the Final Rule would not have a significant economic effect on a substantial number of small entities. The Service is the only entity directly affected by the rulemaking and by definition is not a small entity, and the rulemaking therefore will not have a significant effect on any small entities. In species-specific designations of critical habitat, we always evaluate whether a designation of critical habitat may directly affect small businesses. Therefore, the commenter's concern regarding potential impacts to forestry operations in Alabama would be evaluated in the regulatory flexibility analysis in any future species-specific critical habitat designation.

Comment 23: A commenter stated that an analysis under the Unfunded Mandates Reform Act (UMRA) should have been conducted because the facts presented in the *Weyerhaeuser* case when extrapolated across the United States would have certainly exceeded the \$100 million threshold for that statute.

Response: The requirement to undertake an analysis under the UMRA applies only to regulations containing “federal mandates” that meet the threshold levels under the Act. 2 U.S.C. 1532–1535. The UMRA defines “federal mandate” as a regulation that would impose either “an enforceable duty upon State, local, or tribal governments” (federal intergovernmental mandate”) or “an enforceable duty upon the private sector” (“federal private sector mandate”). 2 U.S.C. 658(5)–(7). The rescission of the Final Rule does not impose an enforceable duty on State, local, or Tribal governments, or the private sector. The only direct impact of this final rule is upon the Service because this rulemaking action pertains to how the Service evaluates potential exclusions from critical habitat designations.

Comment 24: A commenter stated that our determinations with respect to Takings and E.O. 13132 warrant additional explanation given the facts in the *Weyerhaeuser* case, where the designation of critical habitat “threatened to impose a \$33 million cost” based on one unit of critical habitat alone.

Response: The rescission of the Final Rule will not allow for any unlawful takings. The facts in the *Weyerhaeuser* case are not directly applicable because they related to a specific designation of critical habitat for a species, not an overarching regulation outlining the designation process. Furthermore, the rescission of the Final Rule does not directly affect private property, nor does it cause a physical or regulatory taking. It does not result in a physical taking because it does not effectively compel a property owner to suffer a physical invasion of property. Further, the rule does not result in a regulatory taking because it does not deny all economically beneficial or productive uses of the land or aquatic resources, it does substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened species), and it does not present a barrier to all reasonable and expected beneficial uses of private property.

The requirement to avoid the destruction or adverse modification of critical habitat applies to actions on private land only when they involve Federal actions such as authorization or Federal funding. Where an action does implicate authorization or funding by a Federal agency, or the Federal agency directly carries out an activity on private lands, any resulting section 7 consultation under the Act on the designated critical habitat would then consider the effects of the particular proposed action (e.g., issuance of a land-use-related permit) to ensure the critical habitat is not likely to be destroyed or adversely modified by the action. And even a finding that the action was likely to destroy or adversely modify the critical habitat would not result in an unlawful taking, because that finding would not require the Federal action agency or the landowner to restore the critical habitat or recover the species, but rather to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat. Rather than imposing an affirmative requirement that Federal actions improve critical habitat, section 7(a)(2) of the Act prohibits Federal actions from reducing the critical habitat's existing capacity to conserve the species. (Final Rule Establishing Definition of "Destruction or Adverse Modification" of Critical Habitat, 81 FR 7214, p. 7224, February 11, 2016; extending to the adverse-modification analysis the conclusion in *Nat'l Wildlife Fed'n v. National Marine Fisheries Service*, 524 F.3d 917, 930 (9th Cir. 2007), that agency action can only violate section 7(a)(2) of the Act "if that agency action causes some deterioration in the species' pre-action condition"). In other words, the requirement for Federal agencies to ensure their actions are not likely to result in destruction or adverse modification of critical habitat is a prohibitory standard only; it does not mandate or prohibit any action by any private landowner.

Comment 25: A commenter stated that a better analysis or explanation is needed as to why the rulemaking does "not directly affect ... Tribal lands" and only directly affects the Service.

Response: The rescission of the Final Rule does not directly affect any lands; the only direct effect is to guide the Service's analysis when it designates critical habitat. To the extent

that Tribal or other lands may be affected by critical habitat designations, we would consider those cases in future species-specific designations that may affect those lands and where an action had a Federal nexus. Further, as explained above, even in the cases where an action has a Federal nexus, the Federal agency only has a duty to avoid destruction or adverse modification of the critical habitat.

Comment 26: A commenter disagrees with the Service's determination that the rule is procedural in nature and qualifies for a categorical exclusion under the National Environmental Policy Act (NEPA). They contend that designation of critical habitat or exclusion from critical habitat has an impact on the human environment and that impact should not be dismissed.

Response: As discussed below, this rule sets out the overarching process and considerations that the Service undertakes when it designates critical habitat, and this rulemaking action has no significant impacts on the human environment.

Comment 27: A commenter noted that our determination for federalism and E.O. 13132 may achieve the opposite intent of those requirements, resulting in unclear legal standards and leading to an increase in litigation.

Response: For the reasons outlined in the proposed and in this final rule, we have determined that the Final Rule is problematic because it unduly constrained the Service's discretion in administering the Act, potentially limiting or undermining the Service's role as the expert agency and its ability to further the conservation of endangered and threatened species through designation of their critical habitats. We note that the legal standards will still be clear absent the Final Rule because the Policy and 50 CFR 424.19 will apply. We acknowledge that there may be differing views on the best way to achieve species conservation and implementation of the Act. When implementing the Act, we strive to strike a balance between establishing clear legal standards and retaining the discretion necessary for making the best possible decisions based on the specific facts at issue.

Comment 28: A commenter stated that the proposed rescission does not achieve the goals of the Civil Justice Reform Act to write regulations that minimize litigation and provide a clear legal standard.

Response: As we articulated in the proposed rule and this final rule, we find that the Final Rule's language in part is vague, thereby setting an unclear legal standard that was unlikely to minimize future litigation on individual critical habitat designations and any decision to exclude or not. As mentioned above, on January 14, 2021, which was 5 days before the Final Rule took effect, seven environmental groups challenged it, filing suit against the Service in Federal district court in Hawaii. Based on this legal challenge, we also find that the Final Rule did not "minimize litigation." By rescinding the Final Rule, we will return to implementing the regulations at 50 CFR 424.19 and the Policy. Nothing in this action unduly burdens the judicial system, and the rule meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988.

Comment 29: A commenter stated that our determination that the rescission of the Final Rule would not have effects under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, was conclusory in nature.

Response: In order for a regulation to be deemed significant under E.O. 13211, the regulation must be (1)(i) a significant regulatory action under E.O. 12866 or any successor order, and (ii) likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) one that is designated by OIRA as a significant energy action. While OIRA deemed this rule as significant under E.O. 12866, OIRA did not identify the proposed rule as having a significant adverse effect on the supply, distribution, or use of energy, nor did the Administrator of OIRA conclude this is a significant energy action. The rescission of an overarching regulation outlining the process and considerations of exclusions from critical habitat is not expected to have a significant adverse effect on the supply, distribution, or use of energy. Any effect on

these issues that may result from future final designations of critical habitat has been, and will continue to be, documented and analyzed in those species-specific designations of critical habitat.

Required Determinations

Regulatory Planning and Review (E.O.s 12866 and 13563)

Executive Order 12866 (“E.O. 12866”) provides that OIRA will review all significant rules. OIRA has determined that this rule is significant. “Effects of Rescinding the FWS Regulation Exclusions of Critical Habitat Under Section 4(b)(2) of the ESA RIN 1018-BD84 August 2021,” which was prepared for the proposed rule (86 FR 59346), provides an assessment of potential costs and benefits of this regulatory action pursuant to E.O. 12866 and is available at <https://www.regulations.gov> in Docket No. FWS-HQ-ES-2019-0115. We decided not to make any changes to the effects analysis after consideration of the information provided through the public comment process. As noted in the effects analysis, there is uncertainty regarding the conservation needs of species, the specific locations where the species occur, the nature of areas proposed for designation, existing conservation efforts on the ground, and the land uses that are occurring or planned for the relevant areas. The Final Rule’s economic analysis made assumptions based on Service staff experience and provided ranges of potential benefits for illustrative purposes only, not because we thought that any of the outcomes was more or less likely. Rescinding the Final Rule does not automatically result in an economic change, and the magnitude of the net economic impact from this final rule is uncertain.

Executive Order 13563 (“E.O. 13563”) reaffirms the principles of E.O. 12866 while calling for improvements in the Nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O. 13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives and further emphasizes that

regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this final rule in a manner consistent with these requirements. This final rule is consistent with E.O. 13563, and in particular with the requirement of retrospective analysis of existing rules designed “to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.”

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 et seq.), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or their designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

This rulemaking rescinds a rule that outlines Service procedures regarding exclusion of areas from designations of critical habitat under the Act. When effective, the Service will resume the implementation of the 2013 Rule and the Policy jointly with NMFS.

As discussed in our proposed rule, to the extent that the Final Rule differs from the Policy, it is limited to identifying specific factors for consideration that the Policy already enumerates for the Service to consider in weighing the benefits of excluding areas against the benefits of including them, but in a more general sense. Moreover, the Service is the only entity that would be directly affected by this final rule because the Service is the only entity that was implementing the final regulations under 50 CFR 17.90. No external entities, including any small businesses,

small organizations, or small governments, will experience any economic impacts directly from this rule because the Service will continue to take into consideration the relevant impacts of designating specific areas as critical habitat and retain the ability to apply the factors identified in the Final Rule.

The regulatory protections that stem from designating critical habitat occur through section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies are directly regulated by designations of critical habitat. There is no requirement under the Regulatory Flexibility Act to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, even if this rule affects the scope or scale of future critical habitat designations, no small entities will be directly regulated by this rulemaking.

In addition, our decisions to exclude or not exclude areas (where a specific request has been made) based on this consideration of impacts will continue to be judicially reviewable in accordance with the Supreme Court's opinion in *Weyerhaeuser*. At the proposed rule stage, we certified that this rule would not have a significant economic effect on a substantial number of small entities and a regulatory flexibility analysis is not required. Nothing in this final rule changes that conclusion.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.):

(a) On the basis of information contained in the *Regulatory Flexibility Act* section above, this final rule would not “significantly or uniquely” affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this

final rule would not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A small government agency plan is not required. As explained above, small governments would not be affected because this final rule would not place additional requirements on any city, county, or other local municipalities.

(b) This final rule would not produce a Federal mandate on State, local, or Tribal governments or the private sector of \$100 million or greater in any year; that is, this final rule is not a “significant regulatory action” under the Unfunded Mandates Reform Act. This final rule would impose no obligations on State, local, or Tribal governments.

Takings (E.O. 12630)

In accordance with E.O. 12630, this final rule would not have significant takings implications. This final rule would not directly affect private property, nor would it cause a physical or regulatory taking. It would not result in a physical taking because it would not effectively compel a property owner to suffer a physical invasion of property. Further, this final rule would not result in a regulatory taking because it would not deny all economically beneficial or productive use of the land or aquatic resources and it would substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with E.O. 13132, we have considered whether this final rule would have significant federalism effects and have determined that a federalism summary impact statement is not required. This final rule pertains only to factors for designation of critical habitat under the Act and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

This final rule does not unduly burden the judicial system and meets the applicable

standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This final rule would rescind a rule that was solely focused on exclusions from critical habitat under the Act.

Government-to-Government Relationship with Tribes

In accordance with E.O. 13175, “Consultation and Coordination with Indian Tribal Governments,” and the Department of the Interior’s manual at 512 DM 2, we considered possible effects of this final rule on federally recognized Indian Tribes. The Service has concluded that rescinding the Final Rule would not directly affect specific species or Tribal lands. With the rescission of the Final Rule, we will resume the implementation of the 2013 Rule and the Policy jointly with NMFS, which are almost identical to the treatment of Tribal lands under the Final Rule.

During July 2021, we held three separate webinars for Tribes and Tribal organizations to provide an overview of, and information on how to provide input on, a series of rulemakings related to implementation of the Act that the Services were developing, including the proposed rule to rescind the section 4(b)(2) exclusions regulations. We received written comments from Tribal organizations; however, we did not receive any requests for consultation regarding this action.

This regulatory rescission directly affects only the Service, and with or without this rescission the Service would be obligated to continue to designate critical habitat based on the best available data. Therefore, we conclude that this final rule to rescind the Final Rule does not have “tribal implications” under section 1(a) of E.O. 13175, and therefore formal government-to-government consultation is not required by E.O. 13175 and related policies of the Department of the Interior. We will continue to collaborate with Tribes on issues related to federally listed species and their habitats and work with them as we implement the provisions of the Act. See Secretarial Order 3206, “American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act” (June 5, 1997).

Paperwork Reduction Act

This final rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (45 U.S.C. 3501 et seq.). We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We analyzed this final rule in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), and the Department of the Interior Manual (516 DM 8). We have determined that a detailed statement under NEPA is not required because the rule is covered by a categorical exclusion. The Department of the Interior has found that the following categories of actions would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: “Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.” 43 CFR 46.210(i)

The effect of this rulemaking is to rescind the Service-only procedures for considering exclusion of areas from a designation of critical habitat under the Act and return to implementing the regulations at 50 CFR 424.19 and the Policy that was issued jointly with NMFS. As a result, we conclude that the categorical exclusion found at 43 CFR 46.210(i) applies to this regulation. We also considered whether any “extraordinary circumstances” apply to this situation, such that the DOI categorical exclusion would not apply. See 43 CFR 46.215 (“Categorical Exclusions: Extraordinary Circumstances”). We determined that no extraordinary circumstances apply.

Therefore, having considered the extent to which this rule has a significant impact on the human environment, we have determined it falls within one of the categorical exclusions for actions that have no effect on the quality of the human environment. As a result, we find that the categorical exclusion found at 43 CFR 46.210(i) applies to this regulation rescission, and the Service has not identified any extraordinary circumstances that would preclude this categorical exclusion. We did not receive any public comments regarding our stated intention of invoking a categorical exclusion, with the exception of comments asserting that the initial use of a categorical exclusion when the Final Rule was codified (i.e., the rule we are now rescinding) was incorrect. These comments do not conflict with or undermine our analysis here or compliance with applicable NEPA regulations for this rule.

Energy Supply, Distribution or Use (E.O. 13211)

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The rescission of the Final Rule only effects the Service and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, and it has not been otherwise designated by the Administrator of OIRA as a significant energy action. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Authority

We issue this final rule under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 et seq.).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

For the reasons discussed in the preamble, the U.S. Fish and Wildlife Service amends part 17 of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

AUTHORITY: 16 U.S.C. 1361–1407, 1531–1544, and 4201–4245, unless otherwise noted.

Subpart I [Removed]

2. Remove subpart I, consisting of § 17.90.

Subpart J [Redesignated as Subpart I]

3. Redesignate subpart J, consisting of §§ 17.94 through 17.99, as subpart I.

Subpart K [Redesignated as Subpart J]

4. Redesignate subpart K, consisting of §§ 17.100 through 17.199, as subpart J.

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.